[HIGH COURT OF AUSTRALIA.]

BLUNDELL . . . . . APPELLANT;
DEFENDANT,

AND

MUSGRAVE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 30; *Oct.* 19.

Dixon C.J., McTiernan, Williams, Webb, Fullagar and Taylor JJ.

Negligence—Damages—Injury suffered by naval rating by negligence of third party—Treatment in naval hospital—Regulation enabling naval authorities to recover charge of treatment from rating who "recovers or receives damages from a third party"—Whether relevant to question whether rating entitled to recover charge of treatment from third party—Regulation enabling naval authorities to disallow free medical attendance and to impose charge "in circumstances where they consider the charge should not be borne by the department"—Validity—Whether fact that rating may have action against third party in respect of injuries occasioning attendance a relevant "circumstance"—Decision of naval authorities to take no action to recover charge from rating pending result of action by rating against third party—Whether rating entitled to recover charge from negligent third party—Naval Defence Act 1910-1952 (*No.* 30 *of* 1910—*No.* 14 *of* 1952), *s.* 45—*Naval Financial Regulations, regs.* 118 (1) (7), 150A (1).

Regulation 150A (1) of the *Naval Financial Regulations* made pursuant to s. 45 of the *Naval Defence Act* 1910-1952 provides: "150A. (1) Notwithstanding anything contained herein, where a member who has been granted medical attendance under these Regulations recovers or receives damages from a third party, the Naval Board may require the member to pay to such officer of the Department as the Board directs either in a lump sum or in such instalments as the Board directs, the whole or any portion of the cost of medical attendance granted under these Regulations, and thereupon the amount so directed to be paid shall be a debt due to the Commonwealth."

Held, that, as no legal liability under the regulation can arise until after a member of the forces has recovered or received damages from a third party, it is irrelevant to the question whether the member is entitled to recover from the third party any sum by way of damages in respect of medical attention granted to him.

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Regulation 118 of such *Regulations* provides that: "118. (1) Members of the Permanent Naval Forces (Sea-going) shall be granted free medical attendance subject to the following sub-regulations. . . . (7) The Naval Board may at their discretion disallow free medical attendance or make a charge for such attendance in circumstances where they consider the cost should not be borne by the Department."

Held, that reg. 118 (7) is valid.

A naval rating injured while on leave by the negligence of a third person received medical treatment at a naval hospital from 20th June 1954 until 16th February 1955. On 19th August 1954 the Naval Board decided that free medical attendance should be disallowed in the case of the rating and that a charge should be made for the same. The evidence did not show whether or not this decision had been communicated to the rating prior to his discharge from hospital. At a later stage the rating received from one of his superiors a document indicating that a charge of £594 8s. 8d. in respect of his hospital and medical treatment had been debited against his pay account. The document contained the following, *inter alia* : "Pending the result of legal proceedings which have been instituted, action is NOT to be taken to recover this charge from his pay account." In an action by the rating to recover damages for negligence from the third person,

Held, by *McTiernan*, *Williams*, *Webb* and *Taylor* JJ., *Fullagar* J. *contra*, *Dixon* C.J. expressing no opinion, that the fact that the expenses arose from an injury to the rating caused by the negligence of the third person which gave the rating a right to sue that person for damages could be reasonably regarded by the Naval Board as a circumstance why the rating should be required to bear the expenses himself.

Held, further, by *McTiernan*, *Williams*, *Webb* and *Taylor* JJ., *Dixon* C.J. and *Fullagar* J. dissenting, that the charge made by the Naval Board had been lawfully made and liability imposed on the rating to pay the same, it being of no consequence that the board might forgive the whole or part of the charge in the event of the rating not succeeding in the action. Accordingly the charge formed part of the damage in respect of which the rating was entitled to recover in the action.

Decision of the Supreme Court of Victoria (*Smith* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

On 15th December 1954 John Anthony Musgrove commenced an action in the Supreme Court of Victoria against George M. Blundell claiming damages in respect of personal injuries suffered by him as a result of being struck by a motor car driven by the defendant in Drummond Street, Carlton on 19th June 1954.

The action was heard before *Smith* J. and a jury. On 24th October 1955 the jury brought in a verdict for the plaintiff and assessed his general damage at £1,000 but found that the plaintiff

had been guilty of contributory negligence and accordingly reduced the verdict by one-third. By consent of the parties the question whether the plaintiff was entitled to recover a sum of £594 8s. 8d., being an amount allegedly owed to the Commonwealth of Australia for medical and hospital treatment, was withdrawn from the jury and left to the decision of the trial judge. On 4th November 1955 *Smith* J. held that the plaintiff was entitled to recover this sum less one-third on account of his contributory negligence.

From the decision of *Smith* J. the defendant appealed to the High Court of Australia.

Dr. *E. G. Coppel* Q.C. (with him *Kevin Anderson*), for the appellant. Regulation 118 (7) of the *Naval Financial Regulations*, if read literally, enables the Naval Board to charge for medical attendance upon considerations other than those relevant to the Navy and its good government and discipline. Accordingly it is submitted that it goes beyond the regulation-making power contained in s. 45 of the *Naval Defence Act* 1910-1952 and must be read down under s. 46 (*b*) of the *Acts Interpretation Act* 1901-1950. [He referred to *Shrimpton* v. *The Commonwealth* (1).] So read down the regulation does not justify the Naval Board in disallowing free medical attention on the ground that the plaintiff was injured by a motor vehicle driven negligently. Regulation 150A can have no bearing on the liability of the defendant because it operates only after judgment. The fact that it may operate after judgment can form no part of the measure of damage. In any event, on the evidence, the charge made by the Naval Board was conditional on the plaintiff recovering from the defendant in respect of it. Being so conditional, it is submitted that it is not damage suffered by the plaintiff and recoverable.

H. Ball, for the respondent. In order to recover the sum in question against the defendant it is not necessary for the plaintiff to prove that he is legally as distinct from morally obliged to pay such a sum to the Naval Board. [He referred to *Dennis* v. *London Passenger Transport Board* (2)].

A. D. G. Adam Q.C. (with him *R. K. Fullagar*), for the Commonwealth of Australia appearing as *amici curiae*. The only implication to be read into reg. 150A is that the damages referred to should be those recovered or received in respect of the injury for which medical attendance was provided. The regulation does not only cover

(1) (1945) 69 C.L.R. 613.

(2) (1948) 1 All E.R. 779.

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cases where a separate sum has been assessed in respect of the medical attendance. Regulation 118 (7) is valid. It is within the subject matter of medical attendance to provide that free medical attention will always be granted or will never be granted or will be granted in some cases but not in others or will be within the determination of the Naval Board. The Naval Board is put in a very special position under s. 7. of the *Naval Defence Act* 1910-1952 quite unlike that of some subordinate regulation-making authorities. Regulation 150A is not relevant here. If the board had not relied on reg. 118, the jury could have taken into consideration the fact that as soon as it awarded damages the plaintiff would be exposed to liability under reg. 150A. There is no right in members of the Navy to free medical attention, except that given by reg. 118 (1) which is expressed as being subject, *inter alia*, to sub-reg. 7. The power to make regulations for the good government etc. of the Naval Forces includes power to withhold free medical attention. [He referred to *Country Roads Board* v. *Neale Ads Pty. Ltd.* (1); *Gibson* v. *Mitchell* (2); *Riel* v. *The Queen* (3).] Section 36 of the *Naval Defence Act* 1910-1952 provides for the application to the Naval Forces of the *Queen's Regulations and Admiralty Instructions*. These contain an elaborate scheme dealing with the circumstances in which free medical attention is to be provided for members of the Navy and in which the members are to be liable for the cost of such attention.

Dr. *E. G. Coppel* Q.C., in reply. [As to whether a plaintiff can recover in respect of moneys which he is not under any legal obligation to pay to a third person for medical attention he referred to *Liffen* v. *Watson* (4); *Allen* v. *Waters & Co.* (5).]

[DIXON C.J. referred to *Greenaway* v. *Canadian Pacific Railway Co.* (6); *Taylor* v. *Turner* (7).]

Cur. adv. vult.

Oct. 19.

The following written judgments were delivered :—

DIXON C.J. This appeal is from a decision of *Smith* J. with respect to an item of damages reserved for his consideration in an action for personal injuries otherwise tried by a jury. The action for damages was brought in respect of injuries caused to the plaintiff by the negligence of the defendant in driving a motor car.

(1) (1930) 43 C.L.R. 126, at pp. 134, 135.
(2) (1928) 41 C.L.R. 275, at pp. 279, 280, 281.
(3) (1885) 10 App. Cas. 675, at p. 678.
(4) (1940) 1 K.B. 556.
(5) (1935) 1 K.B. 200.
(6) (1925) 1 D.L.R. 992.
(7) (1925) 3 D.L.R. 574.

The plaintiff is a naval rating, an engineering mechanic. While on leave on 19th June 1954 he was run down in Drummond Street, Carlton, by a motor car driven by the defendant. He sustained injuries which included a fracture of the tibia and fibula of his left leg. At the trial his claim for general damages was submitted to the jury but by the agreement of the parties the special damages claimed, which consisted of a single item, were reserved for the determination of the judge. It was a claim in respect of a sum of £594 8s. 8d., covering hospital and ambulance expenses. The jury found a verdict for the plaintiff and assessed the damages at a sum of £1,000. They found, however, that the plaintiff himself was partly at fault and reduced the award of damages by one third. The sum of £594 8s. 8d. was an amount in which, according to the plaintiff's case, he was liable to the Navy Department of the Commonwealth for hospital treatment and ambulance services. The question whether he was so liable was considered to depend on matter of law and therefore to be for the decision of the learned judge. After the plaintiff was injured he was taken to St. Vincent's Hospital but on the following day he was conveyed to the Flinders Naval Depot. He was placed in the Flinders Naval Hospital, where he remained for a period of one hundred and seventy-three days from 20th June 1954. He was again in that hospital for a period of twelve days from 10th December 1954 and for a period of fourteen days from 2nd February 1955. At one period he was conveyed by naval ambulance from the Flinders Naval Hospital to a hospital in Melbourne. The amount of £594 consists of charges for the periods in hospital and for the services of the Naval ambulance. The question is whether the charges should be included in the damages recoverable from the defendant. *Smith* J. decided that they did form an item of special damage which the plaintiff was entitled to recover from the defendant. From that decision the defendant now appeals by special leave. The correctness of the conclusion depends on the question whether they were charges which as between himself and the Navy Department the plaintiff must bear. There is no doubt that, if he must bear them, it is an expenditure on his part occasioned by the injuries which he received.

Under s. 45 of the *Naval Defence Act* 1910-1952 regulations have been made which are called the *Naval Financial Regulations*. They consist of S.R. 1926 No. 198 as amended. The material amendments are to be found in S.R. 1929 No. 90, reg. 9; S.R. 1933 No. 50, reg. 14; and S.R. 1935 No. 6, reg. 5. For the purposes of the matter in hand the cardinal provisions are sub-regs. (1) and (7) of reg. 118. Sub-regulation (1) says: "Members of the Permanent Naval

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Forces (Sea-going) shall be granted free medical attendance subject to the following sub-regulations." Sub-regulation (7), which was inserted by S.R. 1935 No. 6, qualifies sub-reg. (1) with the following provision : " The Naval Board may at their discretion disallow free medical attendance or make a charge for such attendance in circumstances where they consider the cost should not be borne by the department."

Oral evidence was given that on 19th August 1954, that is to say when two months of the plaintiff's long period in hospital had passed, a decision under sub-reg. (7) was made by the Naval Board. The exact terms of the decision have not been given in evidence but whether conditionally or unconditionally the purpose of the decision was to disallow free medical attendance in respect of the hospital and ambulance services in question. It was communicated to the Commodore Superintendent of Training at the Flinders Naval Depot, that is to say the officer commanding the depot, on 20th August 1954 by a letter which was not put in evidence. There was, however, put in evidence a notification dated 25th July 1955 by the supply officer at the Flinders Naval Depot signed on behalf of the Commodore Superintendent of Training. It is evidently a record of the depot and a copy went into the relevant file at the Navy Office. This document referred to the plaintiff and stated that, in accordance with instructions issued by the Naval Board, medical expenses as indicated thereunder had been disallowed by the Naval Board in accordance with *Naval Financial Regulations and Instructions*, art. 186 (11), and were to be charged against his pay account. The paper proceeded : " Pending the result of legal proceedings which have been instituted, action is not to be taken to recover this charge from his pay account." Under this instruction particulars of the expenses were given. To the document is added a note dated 27th July 1955 stating that the amount had been charged against the pay account of the rating in the ledger for the quarter ending 30th September 1955. It is upon the foregoing evidence that the question in effect depends whether the item of damages is recoverable by the plaintiff from the defendant.

There is, however, another regulation which should be mentioned, though only for the purpose of excluding it from consideration as immaterial. It is reg. 150A, inserted by S.R. 1933 No. 50. The material part of sub-reg. (1) of that regulation is as follows : " Notwithstanding anything contained herein, where a member who has been granted medical attendance under these regulations recovers or receives damages from a third party, the Naval Board may require the member to pay to such officer of the department as the board

directs . . . the whole or any portion of the cost of medical attendance granted under these regulations and thereupon the amount so directed to be paid shall be a debt due to the Commonwealth." It will be noticed that there is nothing expressly to identify the description of damages upon the recovery or receipt of which the power under this regulation arises. But it is a reasonable interpretation of the regulation that it relates only to damages covering the medical attendance to which the regulation refers. It is plain on the face of the regulation that it could not apply to impose a liability upon the plaintiff to the Naval Board or the Commonwealth until damages of the kind it contemplates have been recovered or received by the plaintiff. But the very question here is whether such damages can be recovered. Regulation 150A may therefore be put on one side.

It may be safely stated as a general proposition of law that, before a plaintiff can recover in an action of negligence for personal injuries an item of damages consisting of expenses which he has not yet paid, it must appear that it is an expenditure which he must meet so that at the time the action is brought, though he has not paid it, he is in truth worse off by that amount. Generally speaking the question whether he must meet the expense is to be decided as a matter depending upon his legal liability to pay it. Indeed, it seems to have been taken for granted by Lord *Ellenborough* C.J. in *Dixon* v. *Bell* (1) that legal liability was the only criterion. For in that case he directed the jury that inasmuch as a physician could not enforce payment of his fees by action against his patient, a plaintiff who had been injured by the negligence of the defendant could not recover as special damages the fees of a physician who had treated him unless and until he had actually paid the fees. It may be that his Lordship went too far and that, where the situation of the plaintiff is such that as a matter of moral and social obligation he is bound to bear an expense which he could only escape at the cost of his reputation for honest dealing, that is enough. But, however this may be, the basis on which a plaintiff recovers expenses as special damages is that he will have to pay them whether he obtains the amount from the defendant as damages or not. The question here must therefore be whether the plaintiff really stands in a situation in which he must pay the expenses which apparently now stand debited to his pay account whether he recovers from the defendant or not. For it cannot be enough to entitle a plaintiff to recover from a defendant in respect of money still to be paid that the plaintiff is liable to pay it if and only if he recovers a corresponding

(1) (1816) 1 Stark. 287, at p. 289 [171 E.R. 475, at p. 476].

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amount from the defendant. His liability or the necessity of his meeting the expenditure must be independent of his recovery from the defendant. But it is on the plaintiff that the burden rested of showing that, subject to no such condition, it had become incumbent upon him to bear the expenditure in question. An accountant from the Navy Office was called as a witness with a view of proving this to be so. But speaking with reference to the document already mentioned he said: "What that means is that the amount of the medical expenses are to be placed in the debit claim (? column) of his ledger. He has to be charged with that but at the same time in view of the largeness of the amount it is obvious that he cannot pay it, and the Naval Board directs that deduction is not to be made from his pay until such time as he recovers the amount of the medical expenses from the other party." No doubt the case is a difficult one, but it seems in the end to depend upon the question whether the Naval Board took a definitive decision under reg. 118 (7) to charge the pay account of the plaintiff so that he fell under the necessity of paying the amount in any event. In the absence of direct and precise evidence of what the Naval Board decided it is necessary to fall back upon the document of 25th July 1955 of the Flinders Naval Depot. From the bare reading of that document it would appear that the plaintiff was not placed under actual necessity of paying or bearing the hospital and ambulance charges unless he recovered from the defendant in respect of the amount. But in addition the evidence of the accountant shows that this is how the decision had been understood administratively. It seems very unlikely that the decision meant that in any event the naval rating was to pay.

The result is that the plaintiff has not established that a definitive decision was taken under the regulation imposing upon him unconditionally the necessity of paying the amount, and for that reason he cannot recover it from the defendant.

For these reasons the appeal should be allowed.

McTIERNAN, WILLIAMS, WEBB AND TAYLOR JJ. On 19th June 1954 the respondent was struck by a motor vehicle whilst crossing a public street in a suburb of Melbourne. The motor vehicle was under the control of the appellant and in an action subsequently brought the respondent sought to recover damages for personal injury including an amount of £594 8s. 8d. for medical and hospital expenses.

At the time when his injuries were sustained the respondent was an engineering mechanic in the Permanent Naval Forces and was

stationed at Flinders Naval Depot. After the accident he was taken to a public hospital in Melbourne but on the following day—20th June—he was transferred by ambulance to Flinders Naval Hospital where he remained and received appropriate medical treatment until 16th February 1955. The amount of £594 8s. 8d. is said to represent the extent of the respondent's liability to the Commonwealth for the medical and hospital treatment then provided.

The action was tried before a judge and jury but the question whether the sum above referred to was recoverable as part of the respondent's damages was by the consent of the parties withdrawn from the jury and left to the learned trial judge to decide. Upon the other issues in the action the jury found for the respondent and assessed his general damages at £1,000 but, holding as they did, that the respondent was partly to blame for his injuries, they decided that the appellant should pay only two-thirds of that sum. Upon the issue concerning the medical and hospital expenses his Honour, again, found for the respondent and after the sum in question had been reduced by one-third judgment was entered for the respondent for the sum of £1,062 13s. 4d. No question arose upon this appeal concerning the appellant's liability to pay general damages. The only question with which we are concerned is whether the evidence establishes that the respondent was at the time of the trial legally liable in respect of the amount of £594 8s. 8d.

Upon the argument of this appeal we were referred to reg. 118 of the *Naval Financial Regulations* made under the authority of the *Naval Defence Act* 1910-1952 which, in view of what was then said, should be set out in full:

"*Medical attendance.*

118. (1.) Members of the Permanent Naval Forces (Sea-going) shall be granted free medical attendance subject to the following sub-regulations.

Hospital accommodation.

(2.) Arrangements may be made for admission and treatment of officers and men in a hospital with approved accommodation, and the expense so incurred shall be defrayed by the Department.

(3.) The term 'hospital' referred to in these Regulations shall include any hospital—Naval, Military, civil (general or private), receiving home or ward, but shall not include Naval Sick Quarters. In cases of venereal disease, however, the Sick Quarters at Garden Island and Venereal Ward at Flinders Naval Depot shall be regarded as a hospital, and all medical cases under 'bed' treatment at

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Flinders Naval Depot and Royal Australian Naval College shall be regarded as receiving treatment in a hospital with approved accommodation.

Hospital accommodation.

(4.) The cost of medical treatment in a private hospital or by a private practitioner of a member who elects to make his own arrangements shall not be accepted as a charge against the Commonwealth if accommodation considered suitable by the Director of Naval Medical Services is available in a Service or Repatriation Hospital.

(4A.) Where accommodation considered suitable by the Director of Naval Medical Services is not available in a Service or Repatriation Hospital, the Naval Board may approve of reimbursement to an officer who is permitted to make his own arrangements for hospital treatment of an amount not exceeding the sum which would have been involved had arrangements for his treatment been made by the Department.

Surgical operations.

(5.) When, in an emergency, operations are performed by civil surgeons upon officers and men at hospitals with which the Department has no arrangements as to fees, and when patients cannot travel to a recognised hospital, the sum allowed in payment of such operations shall be determined by the Naval Board, but shall not, unless in special circumstances, exceed £30.

Sub-reg. (6) *added by* 1929, *No.* 90.

(6.) Medical expenses incurred by officers and men granted sick leave under reg. 124, sub-reg. (1), par. (*c*), may be paid under conditions laid down by the Naval Board.

Disallowal of free medical attendance. Sub-reg. (7) *added by* 1935, *No.* 6.

(7.) The Naval Board may at their discretion disallow free medical attendance or make a charge for such attendance in circumstances where they consider the cost should not be borne by the Department."

Sub-regulation (6) was added in the year 1929 and the final sub-reg. (7) was added in 1935. We are also referred to reg. 150A of the same regulations. This regulation, which was promulgated in 1933, is as follows :

" 150A. (1.) Notwithstanding anything contained herein, where a member who has been granted medical attendance under these Regulations recovers or receives damages from a third party, the Naval Board may require the member to pay to such officer of the Department as the board directs either in a lump sum or in such

instalments as the board directs, the whole or any portion of the cost of medical attendance granted under these regulations, and thereupon the amount so directed to be paid shall be a debt due to the Commonwealth.

(2.) If any member—(*a*) fails or refuses to pay the amount directed by the Naval Board to be paid in pursuance of this regulation; or (*b*) requests that the amount be deducted from any moneys from time to time becoming due to him as a member; the board may direct that the amount be deducted, in a lump sum or by instalments, from any moneys from time to time becoming due to the member, or may cause such other action to be taken for the recovery of the amount as to the board seems fit."

From the evidence it appears that, on 19th August 1954, the Naval Board decided that free medical attendance—which expression must, in view of the terms of the regulation, be taken to include hospital treatment—should be disallowed and to make a charge for such attendance. This decision was made two months after the respondent had been admitted to the Naval Hospital but it does not appear from the evidence whether this decision was communicated to him at any stage prior to his discharge. It was said that the decision was communicated by letter to the Superintendent of Training at Flinders Naval Depot for the information of the respondent by a letter dated 20th August but the witness who deposed to this fact was unable to say whether the respondent was ever informed of this decision. The evidence of the respondent is silent on the point though it is clear that he did at a later stage receive from one of his immediate superiors a document which indicated to him that a charge of £594 8s. 8d. in respect of his hospital and medical treatment had been debited against his pay account. It appears that a ledger account is kept for each member of the forces upon which credits are entered for pay and allowances earned and debits are entered for all amounts chargeable against earnings. The document which the respondent says was handed to him appears to have been either the original or a copy of an instruction addressed to the ledger keeper and it was in the following terms:

"Flinders Naval Depot.
Victoria.

Supply Officer (Ledgers) 25 Jul 1955

Recruit Stoker J. A. Musgrave O.N. 50229

Medical Expenses

In accordance with instructions issued by the Naval Board, Medical expenses as indicated hereunder, have been disallowed by

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the Naval Board in accordance with N.F.R. & I Art. 186 (11) are to be charged against the pay account of the above-named rating.

Pending the result of legal proceedings which have been instituted, action is NOT to be taken to recover this charge from his pay account. In the event of rating being drafted an appropriate notation is to be made on his transfer list.

Particulars of Expenses			£	s.	d.
Ambulance.					
Naval.	From To	Distance / Rate			
Naval Ambulance	F N D to Prince Alfred Hospital and return	96 / 3/- per mile	14	8	0
Hospitalisation					
Hospital	Period	Days / Rate			
F.N.H.	20. 6.54– 9.12.54	173 / £2.17.6	497	7	6
F.N.H.	10.12.54–22.12.54	12 / £3. 3.7	38	3	0
F.N.H.	2. 2.55–16. 2.55	14 / £3. 3.7	44	10	2
Professional Services.					
Name	Particulars				
		Total	£594	8	8

(s) Illegible Captain(s) R.A.N.
for Commodore

The amount of £594/8/8 has been charged against the pay account of the above-named rating at List 15 No. M728 in ledger of H.M.A.S. *Cerebus* (*sic.*) for quarter ending 30 Sep. '55.

Date 27.7.55 (s) E. Robins
Commissioned Writer Officer".

From this it appears that the period of treatment accorded to the respondent—199 days—expired on 16th February 1955. This was approximately five months before the document itself came into existence.

It is a reasonable conclusion upon the evidence that the respondent did not assume any contractual obligation to pay the amount of the charges specified. His entrance to the Flinders Naval Hospital was in no sense analagous to the entry of a patient into a private hospital for the purposes of treatment; he did not select the hospital nor did he know when he entered it to undergo treatment that he would be expected to pay for the treatment out of his own pocket.

It was not, however, suggested in argument that any sound basis exists for concluding that the respondent assumed any such contractual obligation; the liability, if any, is said to arise pursuant to the regulations referred to and not otherwise.

So far as the respondent's claim depends upon the provisions of reg. 150A it may be disposed of briefly. That regulation was promulgated at a time when the Naval Board was not entitled, under reg. 118, to " disallow free medical attendance or make a charge for such attendance ". Accordingly it appears originally to have been designed to cover cases where a verdict for general damages had been obtained by a member of the forces. In terms it authorises the Naval Board to require the member to pay to such officer of the department as the board directs, either in a lump sum or such instalments as the board directs, the whole or any portion of any cost of medical attendance granted under the regulations. Thereupon the amount so directed to be paid is to constitute a debt due to the Commonwealth. But this power is exerciseable only where a member who has been granted medical attendance under the regulations has recovered or received damages from a third party. For reasons which are apparent it is unnecessary for us to consider whether this regulation was within power for, even on the assumption that it was, no legal liability under it can arise until after a member of the forces has recovered or received damages from a third party. Consequently there is nothing in this regulation which could lead to the creation of a legal liability to pay for medical attendance at any time before the recovery or receipt of damages.

But in any event the Naval Board does not appear to have acted under this regulation. Both the oral evidence and the instruction of 25th July 1955 indicate quite clearly that what the Naval Board purported to do was to disallow free medical attendance and to make a charge for that attendance pursuant to sub-reg. (7) of the regulations. In terms this authorises the making of a charge and no question is raised by the appellant as to the amount of the charge so made. The answers which he makes are, firstly, that the evidence shows that no such charge was actually made in such a way as to create a legal liability in the respondent to pay it and, secondly, that even if such a liability was created, sub-reg. (7) is invalid.

The first contention is based upon evidence which was given by an accounting officer in the employ of the Department of the Navy. After describing briefly the manner in which the ledger account of each member was kept he said that no steps had so far been taken to make any deductions from the pay of the respondent. Indeed the instruction of the 25th July 1955 stipulated that " pending the

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result of legal proceedings which have been instituted action is NOT to be taken to recover this charge from his pay account". The witness also said that no steps would be taken to endeavour to collect the outstanding amount from the respondent until after the termination of the litigation. In answer to the inquiry whether the policy of the board was that the respondent would not be required to pay the sum, or any part of it, unless his action should succeed the witness said that he was not in a position to say. He added: "I cannot anticipate the decision of the Naval Board. It is a matter entirely for the discretion of the Naval Board." It is clear that if the charge made against the respondent's account was fictitious and if there never was any intention of exercising the authority given by sub-reg. (7), no part of the amount in question could be recovered by the respondent. But it is equally clear that if the Naval Board had authority to make the charge and took the appropriate steps to impose a liability to pay the amount in question upon the respondent, it is of no consequence that at some later stage they may forgive the whole or some part of the charge. If one may speculate it is probable that if no part of this sum is recovered by the respondent he will not be required to pay it. This will not, however, mean that he was never under a legal liability to pay it and there is no reason why, if the Naval Board, having authority to do so, sees fit to forego part of a lawful claim, the appellant should, in anticipation of that possibility, receive the benefit of it.

The learned trial judge to whom the decision of this issue was committed appears to have taken the view that a decision was made to charge the respondent the sum in question and expressed the view that the probabilities were that that decision would be maintained. But whether it will be maintained or not is of no consequence if, in the first instance, the charge was lawfully made and a liability created. There was ample evidence upon which the learned judge was entitled to reach this conclusion and it is, in our view, the only conclusion reasonably open on the evidence.

The *Naval Defence Act* provides that the Governor-General may make regulations not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed, for securing the discipline and good government of the Naval Forces, or for carrying out or giving effect to the Act, and, in particular, prescribing matters for or in relation to a number of subjects including the good government of Naval establishments. By s. 7 the Naval Board is constituted as a board of administration for the Naval Forces and it is to have such powers as are prescribed. By s. 31 the Permanent

Naval Forces are liable to continuous naval service and are at all times liable to be employed on naval service. By s. 36, the *Naval Discipline Act* and the *Naval Discipline (Dominion Naval Forces) Act* 1911 and the King's Regulations and Admiralty Instructions for the time being in force in relation to the King's Naval Forces shall, subject to the Act and to any modifications and adaptations prescribed by the regulations, apply to the naval forces. It is unnecessary to refer in detail to the provisions of these enactments, regulations and instructions beyond saying that the Queen's Regulations, as might be expected, make comprehensive provision with respect to medical and hospital treatment for members of the forces. It is sufficient to say that the general regulation-making power, subject to any provision of the Act, extends to the prescription of conditions regulating the service of members of the naval forces, whilst the provisions of s. 36 are sufficiently wide to enable regulations to be made, at least, for the purpose of adapting the provisions of the Queen's Regulations to local conditions. This being so there is no reason why the regulation-making power should not be taken to extend to authorising the making of regulations providing free hospital and medical treatment for members of the Naval Forces either absolutely or upon conditions. Accordingly, there is no reason why sub-reg. (7) should be regarded as invalid. It is merely a qualification of a right given to members to receive free medical treatment and merely provides that this benefit may be withheld by the Naval Board when, in the exercise of its discretion, it considers that the circumstances are such that the cost should not be borne by the Department of the Navy.

Regulation 118 (7) confers on the Naval Board a discretion to disallow free medical attendance or make a charge for such attendance in circumstances where they consider the cost should not be borne by the Department. The sub-regulation commits the exercise of the discretion to the Board and to no one else. It is for the board to decide what are the circumstances in which they will disallow the free medical attendance or make a charge for such attendance. The discretion must, like every other discretion, be exercised bona fide for the purpose for which it is conferred. But here the very purpose of the sub-regulation is to authorise the board to consider whether the circumstances are such that the cost should not be borne by the department. The sub-regulation authorises the board to act under it whenever they consider circumstances are such as to justify them in calling upon a member of the Permanent Naval Forces to pay for his medical attention personally instead of these expenses being borne by the department. Some misconduct

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on the part of a member causing an illness or injury which gave rise to the expenses could be a material circumstance but there are many other kinds of circumstances on which the board could rely. Any circumstance which could be reasonably relevant to the honest exercise of the discretion would be sufficient. It is not for the Court to attempt to prescribe in advance what circumstances would and what circumstances would not be relevant. Suffice it to say that the fact that the expenses arose from an injury to a member caused by the negligence of some person which gave that member a right to sue that person for damages could certainly be reasonably regarded by the board as a circumstance why the member should be required to bear the expenses himself. If a member could recover these expenses as damages from a tort-feasor, there is every reason why the board should consider that such expenses should be charged against the member rather than be defrayed out of the public purse. If authorities are needed relating to the extent to which the Court will define the bounds of a discretion or prescribe the manner of its exercise there are several collected in the judgment of *Williams* J. in *Hall* v. *Braybrook* (1). In two of the cases there mentioned the repository of the discretion was authorised to exercise it in all the circumstances of the case and these words were held to confer a very wide discretion. In *R.* v. *Mills* (2) the question was whether the justices of the county into which an apprentice was to be bound had a general discretion to consider the propriety of the binding or whether their discretion was confined to considering the fitness respectively of the master and the apprentice. Lord *Tenterden* C.J. said: "here they have a general discretion, after enquiring into all the circumstances of the case" (3). A circumstance that the justices were held to be entitled to take into account so as to afford to the parish of Wivenhoe that protection which they considered themselves bound to give was that the parish ought not to be liable to have paupers from a distance settled on it. If the board was entitled, as we think it was, to disallow the free medical attendance or make a charge for such attendance because of the circumstance that the respondent could sue the appellant in tort for damages, the respondent, on such disallowance and upon being charged, as he was, for such attendance, became legally liable to pay the board for his medical attendance and he therefore became entitled to recover these expenses from the appellant as part of his damages. The fact that, if he had failed in the

(1) (1956) 95 C.L.R. 620.
(2) (1831) 2 B. & Ad. 578 [109 E.R. 1257].
(3) (1831) 2 B. & Ad., at p. 581 [109 E.R., at p. 1258].

action, the board would probably not have pursued its claim, supplies, as has been said, no reason why the appellant should escape this liability.

It follows therefore that the charge was lawfully made and that the amount in question was properly the subject of a claim by the respondent. Accordingly the appeal should be dismissed.

FULLAGAR J. This is an appeal from a judgment of the Supreme Court of Victoria (*Smith* J.) in an action for damages for personal injuries, in which the plaintiff was successful. The defendant appeals only with respect to a particular sum of £594 8s. 8d., which was taken into account in the assessment of the plaintiff's damages.

On 18th June 1954 the plaintiff, while walking in a street in Carlton, was struck and injured by a motor car driven by the defendant. His action was tried before *Smith* J. with a jury. In answer to questions submitted to them the jury found that the accident was caused by negligence on the part of the defendant, and that there was contributory negligence on the part of the plaintiff. They assessed the plaintiff's general damages at £1,000, and found that that amount should, under the *Wrongs (Contributory Negligence) Act* 1951 (Vict.), be reduced by one-third. The plaintiff had claimed, in addition to general damages, the sum of £594 8s. 8d. as special damages, and it had been agreed by counsel that, in the event of a verdict for the plaintiff for general damages, the learned judge should himself decide the questions raised by this claim. His Honour decided these questions in favour of the plaintiff. The total damage suffered by the plaintiff was thus ascertained at £1,594 8s. 8d., and judgment was given for him for two-thirds of this amount, viz. £1,062 13s. 4d. If his Honour's decision was wrong, the amount of the judgment must be reduced to £666 13s. 4d.

The plaintiff is a member of the Permanent Naval Forces, and was at all material times stationed at the Naval Depot at Flinders in Victoria. He sustained, as a result of the accident, transverse fractures of the tibia and fibula of one of his legs. In connexion with the treatment of these injuries he spent certain periods in the Naval Hospital at Flinders, and at one stage he was taken by naval ambulance to the Alfred Hospital and back to Flinders. With respect to these matters the naval authorities charged him, or purported to charge him, with the sum which is in dispute on this appeal. The plaintiff says that, having been " charged " this sum for hospital treatment and ambulance transport, he is entitled to recover it from the defendant as part of his damages. The amount seems large, but no question of amount was raised before us. In

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order to understand the position, it is necessary first to refer to certain Regulations made by the Governor-General under the *Naval Defence Act* 1910-1952 (Cth.).

The two regulations which are material are contained in the *Naval Financial Regulations*. The first is reg. 150A, which first came into force in 1933, and is in the following terms:—"(1) Notwithstanding anything contained herein where a member who has been granted medical attendance under these regulations recovers or receives damages from a third party, the Naval Board may require the member to pay to such officer of the department as the board directs either in a lump sum or in such instalments as the board directs, the whole or any portion of the cost of medical attendance granted under these regulations, and thereupon the amount so directed to be paid shall be a debt due to the Commonwealth. (2) If any member—(*a*) fails or refuses to pay the amount directed by the Naval Board to be paid in pursuance of this regulation; or (*b*) requests that the amount be deducted from any moneys from time to time becoming due to him as a member; the board may direct that the amount be deducted, in a lump sum or by instalments, from any moneys from time to time becoming due to the member, or may cause such other action to be taken for the recovery of the amount as to the board seems fit."

The second relevant regulation is reg. 118. Regulation 118 (1) provides:—"Members of the Permanent Naval Forces (Sea-going) shall be granted free medical attendance subject to the following sub-regulations." Regulation 118 (2) provides:—"Arrangements may be made for admission and treatment of officers and men in a hospital with approved accommodation, and the expense so incurred shall be defrayed by the department." The term "hospital" is to include naval hospitals. Regulation 118 (7), which first came into force in 1935, provides:—"The Naval Board may at their discretion disallow free medical attendance or make a charge for such attendance in circumstances where they consider the cost should not be borne by the department." Whether the words "medical attendance", either in reg. 150A or in reg. 118 (7), include either a journey in an ambulance or accommodation in a hospital may be doubted, but it has been assumed throughout that they include both.

The plaintiff appears to have been taken immediately after the accident to St. Vincent's Hospital in Melbourne, and two days later (i.e. on 20th June 1954) to the Naval Hospital at Flinders. From this point onwards the evidence is not very satisfactory. It would appear that a ledger account is kept at the Navy Office in Melbourne for each member of the Naval Forces, in which his pay

and allowances are credited and amounts charged against him are debited. There is in evidence what purports to be an instruction from the Commanding Officer at Flinders Naval Depot to the officer in charge of the ledgers. This document is headed " Recruit Stoker J. A. Musgrave O.N. 50229 : Medical Expenses ". It then proceeds : " In accordance with instructions issued by the Naval Board, Medical expenses as indicated hereunder, have been disallowed by the Naval Board in accordance with N.F.R. & I Art. 186 (11) are to be charged against the pay account of the above-named rating. Pending the result of legal proceedings which have been instituted, action is NOT to be taken to recover this charge from his pay account. In the event of rating being drafted an appropriate notation is to be made on his transfer list." Then follow particulars showing how the amount of £594 8s. 8d. is made up. At the foot appears the following :—" The amount of £594 8s. 8d. has been charged against the pay account of the above-named rating at List 15 No. M728 in ledger of H.M.A.S. *Cerebus* (*sic*) for quarter ending 30 Sep. '55." Then come what purport to be the initials of two ledger-keepers, the date 27.7.55. and the signature " E. Robins, Commissioned Writer Officer ". The whole is on a roneographed form with the particulars filled in. An accountant in the Department of the Navy gave evidence that the decision of the Naval Board to " disallow " the " expenses " was made on 19th August 1954, and was communicated to the commanding officer at Flinders Naval Depot by letter dated 20th August 1954. Neither this letter nor any minute or record of the resolution or decision of the Naval Board was put in evidence. Nor does it appear that the decision of the Naval Board was ever communicated to the plaintiff, though it does appear that he became aware some time later that the sum of £594 8s. 8d. had been debited in his pay account in respect of treatment for his injuries. The writ in the plaintiff's action was issued on 15th December 1954. The case has proceeded throughout on the assumption that the " decision " of the Naval Board is correctly stated in the document of 25th July 1955, and that it was, at some stage before the action came on for trial, communicated to the plaintiff.

The plaintiff relies alternatively upon each of the two regulations which have been set out above, but the argument on the one is entirely different from the argument on the other. He says, firstly, that reg. 150A of its own force justifies the inclusion in his damages of the sum of £594 8s. 8d. He says, secondly, that the decision of the Naval Board to " make a charge " for " medical attendance"

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was authorised by reg. 118 (7), and, being so authorised, had the effect of creating an actual debt owing by him to the Crown, so that the sum in question is recoverable by him from the defendant as part of his damages. Before examining these arguments, it is necessary to consider certain general principles.

In an action for damages for personal injuries caused by negligence, expenditure necessarily or reasonably incurred in connexion with medical, surgical and nursing attention, the services of an ambulance and treatment in a hospital, is, of course, recoverable by the plaintiff as part of his damages. It is not necessary for him to prove that he has paid the fees chargeable for the services rendered, but it is, generally speaking, necessary for him to prove that he has incurred a legal obligation to pay those fees. In *Dixon* v. *Bell* (1) the plaintiff had required the services of a surgeon and also of a physician. At that time a surgeon was entitled to sue for fees for his services, but a physician was not. Lord *Ellenborough* C.J. directed the jury " that as to the surgeon's bill, they were to consider the amount as paid by the plaintiff, since the surgeon could compel the payment of it as a legal debt, but that the physician's fees could not be taken into the account, since they had not been actually paid, and he could not enforce the payment by action " (2). Cf. *Randall* v. *Raper* (3), per *Crompton* J. The right to recover depends, of course, on a practical certainty, or at least a high degree of probability, that the payment will have to be made. The existence of a legal liability is strong prima facie evidence that the payment will have to be made. But it is not conclusive evidence. There may be exceptional cases, in which a legal liability exists, but it may be taken as practically certain that the liability will not be enforced. In such cases no amount can be recovered as for a prospective expenditure.

The principle laid down in *Dixon* v. *Bell* (1) was recently applied in two Canadian cases, to which reference was made by the learned Chief Justice during argument. These are *Greenaway* v. *Canadian Pacific Railway Co.* (4) and *Taylor* v. *Turner* (5). There is, however, one very recent English case, which represents at least an apparent departure from the latter part of Lord *Ellenborough's* direction in *Dixon* v. *Bell* (1). In *Allen* v. *Waters* (6) it was claimed that damages for personal injury should include an amount claimed by the London

(1) (1816) 1 Stark. 287 [171 E.R. 475].
(2) (1816) 1 Stark., at p. 289 [171 E.R., at p. 476].
(3) (1858) El. Bl. & El. 84, at p. 90 [120 E.R. 438, at p. 441].
(4) (1925) 1 D.L.R. 992, at p. 995.
(5) (1925) 3 D.L.R. 574.
(6) (1935) 1 K.B. 200.

County Council for treatment and attendance at a hospital provided by it. The answer made was that the claim of the council was statute-barred. Lord *Hanworth* M.R. and *Romer* L.J. were of opinion on the construction of the relevant statutes, that the claim was not statute-barred. The third member of the Court of Appeal, *Goddard* J. (as he then was), was of the contrary opinion on this point. All members of the court, however, were of opinion that the amount claimed by the council could be recovered by the plaintiff as part of his damages even if it were statute-barred. This decision can, I think, only be justified (if at all) on the ground on which it was put by *Goddard* J., viz. that the right of the council subsisted, although the remedy was barred. I shall refer again to this case later.

Two other cases, which were cited during argument, appear to me to belong to a somewhat different class of case. These are *Liffen* v. *Watson* (1) and *Dennis* v. *London Passenger Transport Board* (2). In the former case a domestic servant was prevented by her injuries from remaining in her employment, in which she received wages and free board and lodging. After the accident she went to live with her father, to whom she made no payment for board and lodging. It was held by the Court of Appeal that she was entitled to include in her damages not only the amount of wages lost but (although she had apparently had free board and lodging with her father) the value of board and lodging lost. In the later case the plaintiff had received no wages during a period of disability, but the Minister of Pensions and his employers had paid to him, in pension and sick pay, amounts which together equalled his wages. *Denning* J. (as he then was) held that, notwithstanding the receipt of those payments, he was entitled to include in his damages the amount of wages lost during the period of disability. These cases really belong to the same class as those which I discussed in an inconclusive way in *Attorney-General for New South Wales* v. *Perpetual Trustee Co. (Ltd.)* (3); the leading case may be said to be *Bradburn* v. *Great Western Railway Co.* (4). In these cases the question is not whether the plaintiff is entitled, in the assessment of his damages, to be credited with the amount of an actual or prospective expenditure by him, but whether he ought to be debited with the amount or value of a subvention of which he has had the benefit. The authorities on the latter question are in a most unsatisfactory state, but they need not be further discussed here.

(1) (1940) 1 K.B. 556.
(2) (1948) 1 All E.R. 779.
(3) (1952) 85 C.L.R. 237, at pp. 291-293.
(4) (1874) L.R. 10 Ex. 1.

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I would make, with respect, one comment on *Allen* v. *Waters & Co.* (1), which is equally applicable to *Dennis's Case* (2). The actual form of the judgment does not appear from the report in either case. But in *Allen* v. *Waters & Co.* (1) *Goddard* J. said :—" Any sum which is now recovered by the husband will be held by him for the hospital and will have to be paid by him to the hospital " (3). The Master of the Rolls said :—" . . . he can recover it solely with the liability imposed on him of handing over the money to the hospital " (4). And in *Dennis's Case* (2), *Denning* J., after saying that the plaintiff should recover the amount of wages lost, added : " but subject to the direction that the amount paid to the plaintiff by the Ministry of Pensions and the London County Council " (his employer) " shall be paid to those bodies out of the sums recovered " (5). I am unable to see any justification for the imposition of a condition or the giving of a direction of this kind in a judgment for damages at common law. In an action of tort a plaintiff is entitled to have his damages assessed according to law, and to have judgment for the damages assessed *ex debito justitiae*. It is not really within the jurisdiction of the court to exact an undertaking as a condition of giving such a judgment, or to give a direction to the plaintiff as to what he shall do with the amount of his judgment. What he does with his money is no concern of the Court. Five years after *Allen* v. *Waters & Co.* (1), in *Liffen* v. *Watson* (6), *Goddard* J. himself, having become *Goddard* L.J., said :—" What she does with the compensation when she receives it is a matter for her and nobody else " (7). This seems to me to be clearly right. In an action for damages for personal injuries the court is concerned only with the interests of the plaintiff. It is in no way concerned with the interests of his creditors—still less with the interests of someone who may be thought to have a moral claim on him. As *Harvey* C.J. (speaking for the Appellate Division of the Supreme Court of Alberta) said in *Greenaway* v. *Canadian Pacific Railway Co.* (8) : " unless the expense is one which she (the plaintiff) actually makes as a result of the accident, the defendant should not be called on to pay for it for the benefit of someone other than the injured person " (9).

The general principle being as I have indicated, it is quite clear, in my opinion, that reg. 150A does not entitle the plaintiff in the present case to have included in his damages any sum in respect of medical attendance " granted " to him under reg. 118 (1).

(1) (1935) 1 K.B. 200.
(2) (1948) 1 All E.R. 779.
(3) (1935) 1 K.B., at p. 215.
(4) (1935) 1 K.B., at p. 206.
(5) (1948) 1 All E.R., at p. 779.
(6) (1940) 1 K.B. 556.
(7) (1940) 1 K.B., at p. 558.
(8) (1925) 1 D.L.R. 992.
(9) (1925) 1 D.L.R., at p. 995.

With regard to the construction of reg. 150A, I would agree that the "damages" referred to are damages for some wrongful act or omission which has brought about the necessity of medical attention. On the other hand, the words "recovers or receives" show that the regulation is intended to apply whether the damages are obtained by virtue of a settlement or by virtue of a judgment. And the regulation is applicable irrespective of whether the amount received or recovered specifically includes any amount in respect of medical attendance. But the power given to the Naval Board by reg. 150A only comes into existence after damages have been recovered, and the only way in which the plaintiff's case could be put on reg. 150A is by saying that, in assessing damages, there must be taken into account some amount in respect of the possibility or probability that the Naval Board will exercise the power given by that regulation.

If the condition of the exercise of the power given by the regulation were anything other than the recovery of damages, the argument might well succeed. But what may happen after, and as a consequence of, the recovery of damages cannot, in my opinion, be a material consideration in the assessment of damages. It is true, of course, that damages in respect of medical fees are not necessarily limited to fees which there is a present liability to pay. They may include an estimated amount in respect of a probable future liability to pay fees. But fees can be taken into account only to the extent to which the liability to pay them is directly occasioned by the wrongful act of the defendant. If a liability to the Crown arises after judgment by reason of action taken under reg. 150A, that liability will be directly occasioned not by the wrongful act of the defendant but by the very fact that *some* damages are recoverable and by a voluntary act of the Naval Board. Nor would the position be different if the condition of the power given to the board by reg. 150A had been the recovery of damages specifically in respect of medical attendance. We may take the slightly simpler, but not materially different, case, where a plaintiff agrees with his doctor that he will pay him a reasonable fee if he recovers the amount as part of his damages from the defendant, but that otherwise no fee is to be charged. The recovery of the damages is the condition of his liability to the doctor. But his liability to the doctor is the condition of his right to recover the damages. If he does not establish such an antecedent liability he simply fails to prove that he has suffered the particular damage for which he claims to be compensated. I have grave doubts about the validity of reg. 150A, but,

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assuming it to be valid, it cannot, in my opinion, affect the damages recoverable by the plaintiff from the defendant.

The position with regard to reg. 118 (7) is different. The relevant action under that sub-regulation was taken by the Naval Board before the action came on for trial. Indeed, according to the accountant who gave evidence, the relevant decision of the board was made before action brought. The plaintiff accordingly says simply that at the relevant time he was under an actual and unconditional legal liability to pay to the Crown the sum of £594 8s. 8d. in respect of medical attendance. It follows, he says, that that sum must be included in his damages. If the effect of what was done was in truth to impose an unconditional legal liability on the plaintiff in respect of medical services rendered to him, then it may well be that the consequence follows. But what was done did not, in my opinion, impose such a liability.

In the first place, I do not think that the " decision ", if it purported to impose an unconditional liability, was authorised by reg. 118 (7). The power given is a power to disallow a privilege, and that power can only be exercised in circumstances where the board considers that the cost of providing that privilege should not be borne by the department. Regulation 118 (7) ought not, in the absence of very clear words, to be read as authorising the board to deprive the rating of his privilege on grounds irrelevant to the question whether he ought or ought not to enjoy the privilege. The word " circumstances " must, in my opinion, be read as referring only to circumstances affecting the rating and the Crown *vis à vis* each other. Such circumstances would exist where an injury was due to misconduct or breach of discipline, or occurred while the rating was absent without leave. But they must be circumstances which can fairly be regarded as disentitling the rating to the privilege granted by reg. 118 (1). In other words, it is open to the board to say that the cost ought not to be borne by the department but ought to be borne by the rating ; but it is not open to the board to say that they ought not to be borne by the department but ought to be borne by some third party, such as a wealthy father, or a friendly society of which the rating is a member, or a person who has negligently caused the rating's injury. *A fortiori* it is not open to the board to say that the cost ought not to be borne by the Department because the plaintiff might (there could be no certainty that he would) be able to recover damages for his injury from some third person. No reason existed for an exercise of the power given by reg. 118 (7) except the possibility that damages *might* be recovered.

That possibility could not justify the imposition of an unconditional liability on the plaintiff.

But on the material before us (we have, as I have said, no actual minute or record of the decision) I do not think that any intention is manifested to impose an unconditional liability on the plaintiff to bear the cost of medical attendance. To impose such a liability would, of course, have been grossly unfair, whether or not the imposition was authorised by reg. 118 (7). The decision was, in my opinion, tentative and provisional. The plaintiff is to be debited in his pay-book with the cost, but no steps are to be taken to recover the amount until the result of his action against Blundell is known. In other words, he can draw amounts standing to his credit as if the debit were not there. The clear inference seems to me to be that he is not to be liable unless he recovers damages. His liability is intended to be conditional on his recovering damages. That being so, the case comes within what I have written when dealing with the questions arising in connexion with reg. 150A. The recovery of damages is the condition of his liability to the Crown. But his liability to the Crown is the condition of his right to recover the damages in question. If he does not establish such an antecedent liability, he fails to prove that he has sustained the damage for which he claims to be compensated.

Even if the decision of the board, rightly construed, was a decision to impose in the first place an unconditional liability on the plaintiff, I should still be of opinion that the plaintiff was not entitled to the damages in question. It is quite impossible to suppose—it is indeed unthinkable—that it was ever intended to enforce a charge of £594 against the plaintiff except in the event of his recovering damages in respect of medical attendance. And, as I have pointed out above, damages in respect of prospective expenditure cannot, even where legal liability exists, be recovered if it appears that there is no reasonable probability of that liability being enforced.

I make one observation in conclusion. It was, I think, assumed throughout the hearing that the effect of the decisions in *The Commonwealth* v. *Quince* (1) and *Attorney-General for New South Wales* v. *Perpetual Trustee Co. (Ltd.)* (2), was to preclude the Crown from recovering from the defendant tortfeasor the cost actually incurred in the treatment of the plaintiff. I am not satisfied that this is so. An action for such expenses would not be an action *per quod servitium amisit*, and, the necessity for medical aid being a natural and probable result of the tort, it might be said that its cost is

(1) (1944) 68 C.L.R. 227.

(2) (1952) 85 C.L.R. 237; (1955) A.C. 457.

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recoverable by any person who is under a legal duty to supply it or pay for it. I mentioned this matter in *Attorney-General for New South Wales* v. *Perpetual Trustee Co. (Ltd.)* (1).

In my opinion, this appeal should be allowed, and the amount of the judgment of the Supreme Court reduced accordingly.

Appeal dismissed with costs.

Solicitors for the appellant, *Russell, Kennedy & Cook.*

Solicitors for the respondent, *Gordon Rennick & Gaynor.*

Solicitor for the Commonwealth of Australia, *H. E. Renfree,* Crown Solicitor for the Commonwealth of Australia.

R. D. B.

(1) (1952) 85 C.L.R., at p. 290.